VOLUNTARY RENUNCIATION FROM CRIMINAL ATTEMPTS, THE INTERSECTION OF PUBLIC ORDER AND REHABILITATION: A COMPARATIVE OVERVIEW

التخلي الطوعي عن المحاولات الجنائية، تداخل النظام العام وإعادة التأهيل: نظرة عامة مقارنة

Mansour Farrokhi [(1)]
Mohammad Sadeghi [(2)]

(1) Assistant Professor at Faculty of Humanities, University of Hormozgan (Iran)
farrokhi1389@yahoo.com
(2) Assistant Professor. Hormoz Studies and Research Centre, University of Hormozgan (Iran)
mrs4272@yahoo.com

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Abstract:

Criminal law comprises retributive sanctions as well as preventive measures in order to preserve public order and security. Even the rehabilitation of offenders is intended to provide public tranquillity. However, to achieve this goal requires the penalization of attempted crimes as a pre-emptive action so that official authorities can intervene to combat potential dangerous activities. Nevertheless, voluntary renunciation from such activities may eliminate the possible danger of the prohibited act. Additionally, it is often indicative of remorsefulness of the perpetrator. It can justify the exemption of the offender from criminal liability. Thus, it is ethically unreasonable to punish a person who voluntarily desists from a criminal attempt. However, there is sharp disagreement over the legal nature of voluntary renunciation. It has been shown in the present paper that there is a wide-ranging discussion on the basis and status of voluntary renunciation in criminal law. The main aim of this article is to provide a comparative overview of the matter, but it has to be preceded by explaining the concept of voluntary renunciation as well as the distinction between renunciation and withdrawal.

Keywords: *Criminal Attempt, Voluntary Renunciation, Public Order, Rehabilitation, Abandonment, Withdrawal*

الملخص:

يتضمن القانون الجنائي عقوبات جزائية بالإضافة إلى تدابير وقائية للحفاظ على النظام العام والأمن، وحتى إعادة تأهيل الجناة التي تهدف إلى توفير السكينة العامة، ومع ذلك يتطلب تحقيق هذا الهدف معاقبة كل محاولة لارتكاب الجرائم وهذا كإجراء وقائي حتى تتمكن السلطات الرسمية من التدخل لمكافحة الأنشطة الخطيرة المحتملة، ومع ذلك فإن التخلي الطوعي عن هذه الأنشطة قد يقضي على الخطر المحتمل للفعل المحظور بالإضافة إلى ذلك، غالبا ما يكون التخلي مؤشرا على ندم الجاني، يمكنه أن يبرر إعفاء الجاني من المسؤولية الجنائية، فمن غير المعقول أخلاقيا معاقبة الشخص الذي يكف طوعا من محاولة إجرامية، ومع ذلك هناك خلاف حاد حول الطبيعة القانونية للتخلي الطوعي. وتبين هذه الورقة أن هناك مناقشة واسعة النطاق على أساس وحالة التخلي الطوعي في القانون الجنائي، والهدف الرئيسي من هذه المقالة هو تقديم نظرة عامة مقارنة لهذه المسألة، ولكن يجب أن يسبق ذلك شرح مفهوم التخلي الطوعي وكذلك التمييز بين التنازل والسحب.

الكلمات المفتاحية: المحاولة الجنائية، التخلي الطوعي، النظام العام، إعادة التأهيل، الانسحاب.

[1] - *Corresponding author:* ***Mansour Farrokhi*** *e-mail: farrokhi1389@yahoo.com*

1- INTRODUCTION:

Criminal law imposes punishment for those who engage in prohibited conducts by law. In general, the conduct is mainly done to achieve desirable goal, result or outcome. Not always the result is possible for several factors not related to the actor's desire and actions. This is why the doctrine of attempted criminal liability has been created, as a powerful tool to protect society from dangerous act and dangerous actors.[1] This justification is based on the preservation of public order. Wrongdoing and harm are the two key factors that should be taken into account in this regard. However, the value and status of these factors is largely dependent on the justification of criminal law.

If we should not be abolitionists, criminal law must be capable of realizing some value that gives us sufficient reason to retain it. To offer an account of this value is to offer a *general justification* of criminal law. Obviously enough, the functions of criminal law tell us something about what this might be. If the punitive view is correct, criminal law's value consists in delivering justified punishment. If the curial view is correct, that value consists (in part) in people offering answers that they have reason to offer. If the preventive view is correct, it consists in preventing criminal wrongs. There are wrong less harms (think of sporting injures caused without foul play) and harmless wrongs (think of botched conspiracies or undiscovered attempts). One possibility is that criminal law's concern with wrongs is derivative of its concern with harms: criminal law should prevent wrongs (e.g., conspiracy to injure) when and because harm is thereby prevented (e.g., injury itself). Another possibility is that criminal law's concern with harms is derivative of its concern with wrongs: criminal law should prevent harms (e.g., physical injury) when and because those harms are wrongfully caused (e.g., by assault) A third possibility is that harms and wrongs provide two independent sources of general justification. Whatever the answer, this preventive value is impersonal in two ways: it is not grounded in any special relationship; and it is value that might in principle be realised by any of us.[2]

As regards criminal attempts, the preventive view plays a significant role. It is because that an attempted crime does not itself cause the prohibited result which is contemplated by the offender. However, it is justifiable to punish a person who attempts to commit a crime merely on the basis that exercising such punishment may prevent others from doing so.

Admittedly, the fact of change of mind seems intuitively to be of tremendous ethical importance to responsibility for attempt[3]. If we consider wrongs and harms as independent factors of the justification of criminal law, voluntary abandonment of criminal attempts can justifiably be recognized as a ground for the exemption of criminal liability or punishment. In fact, the preventive view is a two-sided theoretical basis in respect of criminal attempts. It justifies the penalization of attempts on the one hand and non-punishment of voluntary renunciation on the other. Putting in other words, just as the

punishment of the perpetrators of attempts is intended to prevent possible criminal consequences as well as to empower the police and judicial authorities to intervene and combat dangerous activities, non-punishment of those who voluntarily abandon criminal attempts can be justified on the basis of preventive perspective.

Voluntary renunciation is considered as an established institution in Romano-Germanic (civil law) system. However, although courts operating under the common law mentioned the concept, there was traditionally no renunciation defence[4]. Under the MPC's definition, a defendant is entitled to the affirmative defence of renunciation if "he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose." A "complete and voluntary" renunciation must satisfy two factors: (1) it must "originate with the actor," and not be brought about by circumstances that make the crime more difficult or dangerous to commit; and (2) it must be "permanent and complete, rather than temporary or contingent".[5]

What is essential is that the perpetrator voluntarily desists from the criminal act, but his or her motive is immaterial in this regard. Additionally, a third party's intervention to prevent the criminal activity does not necessarily negate the voluntariness of renunciation. For example, if a third party by advising the perpetrator and without resorting to threat or force, causes him/her to desist from committing the crime, renunciation is regarded as voluntary. Accordingly, renunciation is deemed voluntary where the agent discontinues the criminal act, while hearing police sirens.[6] Another example of voluntariness of renunciation is that the agent not because of being admonished, but due to his/her false belief that somebody else is present in the crime scene, abandoned his/her effort to commit the crime (Ibid, 228). A defendant, however, could not claim the defence if his abandonment was merely a postponement or was occasioned by the appearance of circumstances that made success less likely.[7]

The difference between renunciation and repentance should be taken into account. Renunciation arises before the completion of a crime, whereas repentance occurs after that. For instance, if a thief after gathering stolen goods and leaving the house, repented of what he/she had done and returns the goods, he/she will be convicted of theft. In fact, it is not regarded as renunciation.[8] It should be noted that in some criminal justice systems renunciation can be a defence even if it occurs after committing the prohibited act, provided that the perpetrator prevents the result that would constitute the completed crime. [9]

From a consequentialist perspective, the key difference between a completed attempt and an abandoned attempt is in the risk created by each. A completed attempt creates a risk of social harm beyond that which is created by an abandoned attempt: someone who abandons his attempt forgoes opportunity to

complete the harmful conduct that criminal laws prohibit. Therefore, mitigating the punishment for abandoned attempts could reduce social harm if, by punishing abandoned attempts less severely, punishment schemes can induce offenders to withdraw from their criminal conduct. This type of punishment scheme, which deters the completion of the crime but not its initiation, is said to achieve marginal deterrence.[10]

Admittedly, a defendant cannot be charged with attempt if he has abandoned his pursuit of the substantive offense at the mere preparation stage. Yet, this is for want of an element of the offense of attempt—a substantial step—rather than because of the availability of an affirmative abandonment defence. Putting in other words, there are cases in which the defendant abandons before he's even tried to commit the crime; imagine the person who intends to rob a bank, has a hearty breakfast in preparation, and then changes his mind. But the explanation for why criminal penalties are inappropriate in cases like that does not appeal to the fact of change of mind. Instead, it points to the fact that the defendant has not done enough, or has not done the right kind of thing, to count as having attempted the crime at all.[11]

Most criminal justice systems have recognized renunciation as a defence to criminal attempts, albeit by divergent provisions on the topic. However, there are almost common grounds justifying the recognition of renunciation as a defence. German criminal law seems to be a leading criminal justice system in developing the foundations of the defence. Over the years, the rationale of the German Criminal Code's recognition of withdrawal from an attempt has been much debated in German criminal law, including in a spectrum of theories, including:

- ''rationale of punishment'' theory: withdrawal renders punishment unnecessary for specific or general deterrence purposes;
- ''Golden bridge theory'': punishment exemption gives offender an incentive to abandon the attempt by ''building him a golden bridge'', thus allowing him to ''return to legality'';
- ''element-negating and justification'' theories: withdrawal negates liability by negating the requisite intent or functioning as a justification; largely abandoned, because it would extend to accomplices and because ''an attempt remains an attempt'' and cannot be undone.[12]

2. DISTINGUISHING BETWEEN RENUNCIATION AND WITHDRAWAL:

It is very important to make a distinction between renunciation and withdrawal. The latter means a perpetrator's voluntary exit from a criminal participation including conspiracy and complicity, whereas the former refers to a person's desisting from a criminal attempt. In some criminal jurisdictions there are separate provisions and rules regarding the two categories. For instance, In the United States the three interrelated defences are abandonment, withdrawal and renunciation. Withdrawal is a defence for conspiracy liability, whereas

'abandonment' and 'renunciation' are applied to inchoate crimes. The defence is called abandonment defence in some states, but the terms renunciation defence and abandonment defence are frequently used interchangeably.[13]

American jurisdictions that retain the English common law version of the crime now define conspiracy, consistent with Lord Denman's famous opinion in Rex v. Jones (1832), as an agreement between two or more persons to commit an unlawful act, or to commit a lawful act by unlawful means. The actus reus of conspiracy is the agreement, which may be proven circumstantially through concerted action toward a common purpose. The mens rea of conspiracy is a dual intent: the defendant must have both intent to agree and intent to commit the object of the agreement.[14]

Put simply, conspiracy is an inchoate crime, meaning that it contemplates the commission of a substantive crime. Its usual elements are: (1) an agreement to commit a crime; (2) an overt act taken in furtherance of the agreement; (3) and the intent to both agree to and to commit the conspiracy's substantive target crime.[15]

Two interrelated justifications are traditionally advanced for punishing agreements to commit unlawful activity. First, conspiracy is an inchoate crime that allows law enforcement to intervene early enough in the criminal process to apprehend dangerous individuals and prevent their completion of planned acts. Second, conspiracies present special dangers to the public because the psychological dynamics and synergies of group activity make the object of a plan more likely to succeed when contemplated by a group than when contemplated by an individual.[16]

It should be noted that although agreement is an essential element of conspiracy, it also requires an act illustrating the conspirators' intent. Putting in other words, an overt act taken in furtherance of the agreement should be regarded as a key factor in the commission of conspiracy; otherwise prosecutors could arbitrarily accuse anyone of conspiracy merely for an agreement to commit a crime. A mere agreement is an expression of common desires of two or more persons to achieve a goal which should not be considered as a criminal act. However, if an agreement to commit a crime is at the same time accompanied by a certain plan to perform the intended crime, it can be classified as a criminal conspiracy. In fact, drawing the plan is regarded as an overt act. Thus, the expression 'in furtherance of the agreement' does not necessarily amount to an interval between the agreement and the act.

As we have seen, traditional common law conspiracy doctrine did not admit a defence even if the actor subsequently renounced the conspiracy and actively worked to prevent its accomplishment. This rule flowed naturally from the doctrinal principle that a conspiracy is complete with the agreement; as soon as the agreement is made, the crime is completed, and no subsequent action can

exonerate the conspirator. The ALI (American Law Institute) considered this "strict and inflexible" rule to be overly severe, punishing even a momentary agreement from which the actor subsequently and completely withdrew. The ALI was not comforted by the overt act requirement, adopted at American common law to mitigate this harsh result and also embraced in the Code with respect to conspiracies to commit misdemeanours and lower-level felonies. The ALI thought that the overt act requirement provided insufficient protection against injustice "in view of the insignificant nature of the act that suffices." Alternatively, the commentary to the Model Penal Code suggests that the defence of renunciation supplements the overt act requirement (and substitutes for the overt act in the case of second-degree felonies and above) with another locus penitential, giving the actor an opportunity to reconsider and avoid liability. In other words, one of the purposes of the overt act requirement is to provide a chance for a conspirator to withdraw from the conspiracy without accruing any liability. [17]

There are four primary implications of the withdrawal doctrine under federal conspiracy law. First, if the conspiracy requires proof of an overt act, such as under 18 U.S.C. § 371, withdrawal prior to the commission of an overt act means that the withdrawing actor is not liable for the conspiracy. Second, withdrawal commences the statute of limitations with respect to the withdrawing actor. Under federal law, withdrawal may thus be a complete defence to a conspiracy charge but only when coupled with a viable statute of limitations defence. Third, under the Pinkerton doctrine, the withdrawing conspirator is not liable for the substantive crimes of co-conspirators committed after the date of withdrawal, even if those crimes are in furtherance of the conspiracy and reasonably foreseeable. Finally, statements made by co-conspirators after the date of withdrawal are not admissible against the withdrawing conspirator under the hearsay exemption in subsection 801(d) (2) (E) of the Federal Rules of Evidence. Withdrawal is thus a far more limited doctrine than renunciation; unless it is undertaken before an overt act is completed by one member of the criminal enterprise or the statute of limitations has elapsed since the date of the actor's withdrawal, proof of withdrawal does not insulate the actor from criminal liability altogether, but rather limits the proof that may be admissible against him.[18]

However, not all criminal justice systems have made a distinction between the two concepts. For instance, in German Criminal Code (§ 24 & 31), the expression 'withdrawal' (Rücktritt) is being used for both renunciation from criminal attempts and withdrawal from attempted participation.[19] Articles 24 & 31 of the German Criminal Codes read as follows:

§24. (1) A person who of his own volition gives up the further execution of the offence or prevents its completion shall not be liable for the attempt. If the offence is not completed regardless of his actions, that person shall not be liable if

he has made a voluntary and earnest effort to prevent the completion of the offence.

(2) If more than one person participate in the offence, the person who voluntarily prevents its completion shall not be liable for the attempt. His voluntary and earnest effort to prevent the completion of the offence shall suffice for exemption from liability, if the offence is not completed regardless of his actions or is committed independently of his earlier contribution to the offence.

§ 31. (1) According to § 30 is not imposed on anyone who voluntarily gives up the first attempt to induce another to commit a crime, and about existing risk that the other commits the act, turning away, the second after he had agreed to a crime, gives up his plan or, adopted after he agreed a crime, or the offer of another to commit a crime had prevented action.

(2) If it fails to act without the assistance of withdrawing or is it done irrespective of his previous behaviour, it is sufficient to his impunity be voluntary and serious effort to prevent the action.''

In some criminal justice systems, the terms 'withdrawal' and 'abandonment' are interchangeably used in order to indicate an accomplice's exit from a criminal complicity.[20] For example, the Criminal Code of Finland (2015) in Chapter 5 (Section 2 (2)) reads as follows:

''If the offence involves several accomplices, the perpetrator, the instigator or the abettor is exempted from liability on the basis of withdrawal from an offence and elimination of the effects of an offence by the perpetrator only if he or she has succeeded in getting the other participants to withdraw from completion of the offence or otherwise been able to prevent the consequence referred to in the statutory definition of the offence or in another manner has eliminated the effects of his or her own actions on the completion of the offence.''

Section 24 (Sub-sections 3 and 4) of Criminal Code of Czech Republic (2009) provides as follows:

''(3) Criminal liability of the participant shall expire, if he/she voluntarily abandons any further participation in commission of a crime and a) eliminates the threat to an interest protected by this Code arising from his/her participation in the offence; or

b) Reports his/her attempt at a time when the threat to an interest protected by this Code arising from his/her participation in the offence could still be eliminated. The report must be made to a public prosecutor or police authority. A soldier may report it to his/her superior officer.

(4) If there are several persons involved in an act, expiration criminal liability for the participation is not precluded in case of a participant who acted in such manner, if the act is completed by the other offenders despite his/her timely reporting or earlier participation in such an act.''

Section 43 of Penal Code of Estonia reads as follows:

"If several offenders participate in an attempt, the person who prevents the occurrence of the consequences of the offence is deemed to have abandoned the attempt. If the consequences occur or do not occur regardless of the conduct of an offender, the offender is deemed to have abandoned the attempt if the offender earnestly endeavours to prevent the occurrence of the consequences.

(1) A person having committed an attempt to instigate a criminal offence, consented to a proposal to commit a criminal offence or agreed to commit a criminal offence is released from guilt if the person voluntarily:

1) interrupts the instigation of another person to criminal offence and prevents the possible danger of committing the act;

2) Abandons the consent granted for committing a criminal offence; or

3) Prevents the agreed committing of a criminal offence.

(2) If a criminal offence is committed or the committing thereof is refrained from regardless of the acts of the person, the person is deemed to have abandoned it if he or she earnestly endeavours to prevent the commission of the criminal offence.''

As it can be seen, irrespective of some trivial differences in criminal jurisdictions, the following requirements should be met so that a court can award an exemption from punishment to those who have attempted to commit a corporate offence either as a participant or an accomplice:[21]

- Causing the other participants to withdraw from completion of the offence;
- Prevention of the attempted crime or the consequences of the act performed;
- Making an earnest effort to prevent the commission of the crime;[22]
- Elimination of the effects of his/her own actions on the completion of the offence or any threat to an interest protected by the criminal statute arising from his/her participation in the offence.

3. STATUS OF RENUNCIATION IN CRIMINAL JUSTICE SYSTEMS:

3.1. THE CONSEQUENTIALIST VERSUS THE ACT-CENTRED VIEW:

According to a pragmatic approach to criminal liability, result of a crime must be a key factor in the determination of judicial reaction to it. Upon this

attitude which can be characterized as 'the *consequentialist theory of criminal liability', the legislature as the establisher of public order, should consider consequences of criminal acts as essential criteria of the formal reaction to any breach of criminal law. In other words, for those jurisdictions which have adopted this attitude, the result of criminal behaviour is more important than the perpetrator's intent and his/her embarking on the abandonment of the intended crime.* For instance, in Chinese criminal law, damage element is determinative of the punishment of voluntary discontinuation of a crime. Article 24 of Criminal Law of the People's Republic of China provides that ''Discontinuation of a crime refers to a case where, in the course of committing a crime, the offender voluntarily discontinues the crime or voluntarily and effectively prevents the consequences of the crime from occurring. An offender who discontinues a crime shall, if no damage is caused, be exempted from punishment or, if any damage is caused, be given a mitigated punishment.''

There is a noteworthy provision in Finnish criminal law that shows an extreme consequentialist tendency. The Criminal Code of Finland has provided regulations of renunciation from an attempt and elimination of the effects of an offence by the perpetrator in Chapter 5, Section 2. According to Subsection 3 of Section 2, ''In addition to what is provided in subsections 1 and 2, an attempt is not punishable if the offence is not completed or the consequence referred to in the statutory definition of the offence is not caused for a reason that is independent of the perpetrator, instigator or abettor, but he or she has voluntarily and seriously attempted to prevent the completion of the offence or the causing of the consequence.'' As this provision specifies no causality link between perpetrator's action and the incompletion of the offence or non-occurrence of the result is needed. In other words, if the offence is not completed or its consequence is not caused, the agent who voluntarily discontinues the crime will not be punishable, whether or not his/her effort to prevent the criminal result or withdrawal from performing the offence, have been effective.

However, if we concentrate on the above-mentioned aspect of criminal liability, the objective perspective prevails. Nevertheless, objectivism in this respect is imperfect and only confined to effect, whereas one's behaviour is immaterial. In contrast, circumstances and events outside the agent's power are supposed to be main elements of sentencing.

The opposite approach as the act-centred attitude pays attention to the perpetrator's behaviour and disregards the consequences resulted from his/her action. In fact, not to continue the criminal activity on his/her free will is a key factor in this regard. A mentionable example for this view is the Penal Code of Peru (1991) Article 19 of which stipulates as follows:

''If several agents involved in fact, the attempt of one who voluntarily prevented the outcome is not punishable, nor the one who seriously endeavour to

prevent the execution of the offense, but the other participants continue in their execution or consummation will be punishable .''

However, the Peruvian Penal Code like the criminal statutes of many other countries in the world provides that if the agent who has individually attempted to commit a crime voluntarily abandons it and his action constitutes another crime, he/she will be punished for the act performed. Nevertheless, this punishment is not determined to penalize a criminal attempt, but it is considered for a separate offence. For example, if someone unlawfully attempts to enter a building belonging to another, but after breaking the entrance door, voluntarily desists from the entry, he/she will not be punishable for the crime of attempted unlawful entry, but may be convicted of the crime of criminal damage.

Provisions almost similar to the Penal Code of Peru have been included in the German Criminal Code. Article 24 reads as follows:

''1-A person who of his own volition gives up the further execution of the offence or prevents its completion shall not be liable for the attempt. If the offence is not completed regardless of his actions, that person shall not be liable if he has made a voluntary and earnest effort to prevent the completion of the offence.

2- If more than one person participate in the offence, the person who voluntarily prevents its completion shall not be liable for the attempt. His voluntary and earnest effort to prevent the completion of the offence shall suffice for exemption from liability, if the offence is not completed regardless of his actions or is committed independently of his earlier contribution to the offence.''

The Criminal Code of Switzerland is the best illustration of the act-centred view. It explicitly states that a perpetrator, who makes a serious effort to prevent the completion of the crime, may enjoy exemption from penalty or mitigation of punishment, even if the offence occurs irrespective of the efforts of that person. According to Article 23 (4), ''If one or more of the persons carrying out or participating in a criminal act makes a serious effort to prevent the completion of the act, the court may reduce the sentence or waive any penalty if an offence is committed irrespective of the efforts of that person or persons.''

3.2. NON-RECOGNITION OF RENUNCIATION AS A DEFENSE:

In few criminal justice systems, renunciation has not been recognized as a defense to criminal attempts. The question arises in this regard is that what is the reason of this approach? The answer probably lies in possible misuse of the provisions prescribing such defence. As a general rule, if the attempted crime which has been voluntarily discontinued by the perpetrator is itself a separate offense, then he/she will be punishable for that offence. However, even the latter rule does not convince proponents of the non-recognition view. Their argument is based on the proportionality of crime and punishment. Consider a man pulling a

gun on somebody with intent to kill him, but voluntarily waives his plan to kill the victim. He will be convicted of assault, but not attempted murder if we recognize renunciation as a defense.[23]

Criminal statutes of Uganda and Zambia are among the penal codes which have not recognized renunciation as a defense to criminal attempts. According to Article 386 of the Penal Code Act of Uganda, ‘‘(1) When a person, intending to commit an offence, begins to put his or her intention into execution by means adapted to its fulfilment, and manifests his or her intention by some overt act, but does not fulfil his or her intention to such an extent as to commit the offence, he or she is deemed to attempt to commit the offence. (2) It is immaterial,

a) except so far as regards punishment, whether the offender does all that is necessary on his or her part for completing the commission of the offence, or whether the complete fulfilment of his or her intention is prevented by circumstances independent of his or her will, or whether the offender desists of his or her own motion from the further prosecution of his or her intention, or (b) That by reason of circumstances not known to the offender it is impossible in fact to commit the offence.’’

Article 389 of the Penal Code Act of Zambia containing similar provisions reads as follows:

(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

3.3. RENUNCIATION AS A DEFENSE:

We could basically sort out three main models of the characterization of voluntary renunciation from criminal attempts in various criminal systems. In some countries it is considered as a ground for the exemption from criminal liability which falls under the category of ‘‘defences’’. However, defences can be divided into three categories: ‘‘justifications’’, ‘‘excuses’’ and ‘‘exemptions’’. It is essential to clarify the distinctions and legal meaning of these terms before explaining the status of renunciation as a defence.

An act or omission can rightfully be attributed to me whether or not I ever exercised control over acquiring the attitude that it expresses. So long as my action is rightly taken to be expressive of my real self – so long, that is, as it is the

product, in the right kind of way, of my beliefs and desires, values and commitments, and not of hypnosis, brain manipulation, mental illness or what have you – then it is properly attributable to me. To be sure, control is not irrelevant on attributionist accounts. Absence of control may block attribution to me of the attitudes apparently expressed by my acts. Suppose that my action was not a product of my beliefs and desires, but instead produced by the intervention of a nefarious neuroscientist, by coercion or by certain kinds of (transient) mental illness. In that case, the action does not reflect where I stand on questions of value, and cannot be attributed to me. Absence of control matters only to this extent, on the attributionist account. [24]

Although there has been considerable debate about definitions, most theorists should find the following accounts acceptable. At least two grounds may give rise to a defence after a person has apparently violated a criminal law. First, properties or characteristics of the defendant's act may create a defence. Second, properties or characteristics of the defendant himself may create a defence. Justifications are defences that arise from properties or characteristics of acts; excuses are defences that arise from properties or characteristics of actors. A defendant is justified when his conduct is not legally wrongful, even though it apparently violates a criminal law. A defendant is excused when he is not blameworthy or responsible for his conduct, even though it apparently violates a criminal law (Husak, 1989, 496).[25] Putting in other words, justifications can be invoked where the circumstances or facts make the conduct legally plausible, whereas excuses eliminate moral blame of the perpetrator even where his or her behaviour was criminal.[26] Nevertheless, there is also another discernible defence called exemption from criminal liability which can be based on either the uselessness of punishment and/or crime prevention considerations. Although some cases of this defence like renunciation lies in a lack of blameworthiness, the latter perspectives are more prominent in this regard. Criminal Code of the Republic of Moldova (2009) has specifically put ‘‘voluntary abandonment of a crime’’ under the title of ‘‘Exemption from Criminal Liability’’,[27] Article 56 of which reads as follows:

(1) Voluntary abandonment of a crime shall be considered the cessation by the person of the preparation of a crime or the cessation of actions (inaction) directly aimed at committing a crime provided that the person was aware of the possibility of consummating the crime.

(2) A person may not be subject to criminal liability for a crime if he/she voluntarily and irreversibly abandons the completion of the crime.

(3) A person who voluntarily abandons the consummation of a crime shall be subject to criminal liability only if the act committed includes another consummated crime.

Criminal code of the Kingdom of Spain (2013) has also recognized voluntary renunciation as a ground for exemption of criminal liability; according to Article 16 (2):

''Whoever voluntarily avoids the offence being consummated, either by going no further with its commission when already commenced, or by preventing the result from taking place, shall be exempt from criminal accountability, without prejudice to the accountability he or she may have incurred for the acts perpetrated, should these already have constituted another felony or misdemeanour.''

Accordingly, Criminal Code of the Czech Republic (2009) has regarded voluntary renunciation as an expiry of criminal liability. It has been stipulated by Article 21 (3) as follows:

''Criminal liability for an attempted criminal offence shall expire if an offender voluntarily abandoned further conduct leading to the completion of the criminal offence and,

a) Removed the threat to an interest protected by the Criminal Code which occurred due to the committed attempt, or

b) Reported the attempt to commit an especially serious felony at a time the threat to an interest protected by the Criminal Code which occurred due to the committed attempt could still be removed; the report must be made to a public prosecutor or police authority. A soldier may report it to his/her superior officer.''

Despite the fact that ''exemption from criminal liability'' is very close to ''excuses'' in that both concepts are based on the exclusion of criminal responsibility, it should be noted that the distinction between the two terms is unavoidable. In fact, an ''excuse'' has a personal aspect and relates to offenders' physical or mental characteristics[28], whereas grounds for exemption of punishment are not necessarily and variably related to personal attributes of the offender. Additionally, the rationale of irresponsibility of the perpetrator is different regarding each of the two defences. While irresponsibility in respect of ''excuses'' is resulted from incapacity of an offender and a lack of mental element of the offence, the reason of the exclusion of criminal responsibility in the context of ''exemption from criminal liability'' is either the uselessness of sentencing or the preventive policy of the criminal justice system. As regards voluntary renunciation the latter seems to be a good basis for the offender's exemption of criminal liability.

3.4.RENUNCIATION AS A GROUND FOR EXEMPTION FROM PUNISHMENT:

Punishment is a problematic concept, because it can be understood and defined in multiple ways. Punishment may be considered synonymous with sentence or legal sanction; a state-imposed response to a crime. However, in the

Criminal Justice Act of the United Kingdom (CJA) 2003 it is regarded as one of the purposes of a sentence, hinting at its retributive value. Rather than a purpose in itself, punishment may also be considered instrumental in achieving other aims, such as reducing crime through deterrence and rehabilitation. The CJA 2003 is an amalgam of retributive and utilitarian justifications of punishment. Section 142(1) of the CJA 2003 states that a court 'must have regard to the following purposes of sentencing': (a) the punishment of offenders, (b) the reduction of crime (including its reduction by deterrence), (c) the reform and rehabilitation of offenders, (d) the protection of the public, and (e) the making of reparation by offenders to persons affected by their offences. A court needs to have regard for other purposes of sentencing than punishment (or retribution), including reduction of crime, reform of offenders, protection of the public and reparation.[29]

Traditionally, punishment is considered as a moral communication. Antony Duff formulated a normative theory of communicative punishment, which regards punishment (or hard treatment) as a form of two-way communication: it sends a message to offenders that they have done wrong, and it also constitutes an apology from the offender to the victim and community (Duff, 2011)[30]. While the hard treatment is an expression of an apology, it does not require that the offender is actually remorseful. Nonetheless, punishment potentially has the ability to effect repentance, positive behavioural change and reconciliation – although its effectiveness should not be judged on this basis.[31]

As regards voluntary renunciation, exemption from punishment is based on the fact that imposing punishment on a renouncing agent will not realize any of the purposes of punishment. Besides the lack of social and ethical obscenity of the abandoned conduct, the remorsefulness of a person who voluntarily abandons the crime renders the penalty useless. These two perspectives are both illustrated by criminal statutes of most countries. It should be noted that in many criminal systems a perpetrator's actual remorsefulness may take place in terms of either desisting from the criminal act or preventing the prohibited consequences. For instance, Section 50 of the Norwegian General Civil Penal Code (1902, as amended by the Act of 21 December of 2005) states that 'An Attempt shall cease to be punishable if the offender, before he knows that the felonious activity has been discovered, of his own free will either desists from the felonious activity before the attempt has been completed or prevents the result that would constitute the completed felony.' [32]

However, in some countries like Australia both voluntary abandonment and prevention from criminal results are necessary to exercise exemption of punishment. Section 11.2A (6) of the Australian Criminal Code Act 1995 (consolidated as of July 1, 2017) provides that, 'A person cannot be found guilty of an offence because of the operation of this section if, before the conduct constituting any of the physical elements of the joint offence concerned was

engaged in, the person: (a) terminated his or her involvement; and (b) took all reasonable steps to prevent that conduct from being engaged in.'[33]

While the factors of exemption from criminal liability eliminate the offender's criminal responsibility, grounds for exemption of punishment are legal factors that lead to the waiving of punishment. These two concepts may seem identical in that the result is the same, namely impunity. Nevertheless, it should be noted that moral blameworthiness in the case of ''exemption from punishment'' is far more significant than the defence of ''exemption from criminal liability''. Additionally, the social obscenity of the factors which result in impunity is more than the circumstances under which an exemption from criminal liability is held by the court. This is of great importance as a matter of social attitude.[34]

Last but not least, there is a procedural matter which should be taken into account; as regards ''exemption from criminal liability'' both the prosecution and trial judges are empowered to decide, whereas in the case of ''impunity'', only courts may determine whether the defendant should be exempted from punishment, it is because that an exemption from punishment is preceded by the existence of criminal liability and requires a full consideration by a court. Putting in other words, the defendant shall be exempted from punishment, despite having criminal responsibility.

3.5. RENUNCIATION AS A MITIGATING FACTOR:

Voluntary renunciation from a criminal attempt is considered as a mitigating factor in some criminal justice systems. The Iranian Former Penal Code (1992), Criminal Code of Switzerland (2018), Criminal Code of the People's Republic of China (1997), and Penal Code of Poland are among the criminal statutes that have recognized voluntary abandonment as a mitigating factor in one way or another. It may apply to all variations of voluntary renunciation or only to certain circumstances.

Article 41 (Note 2) of the Iranian Former Penal Code (1992) provided that ''whoever has attempted to commit a crime abandons the criminal act on his or her own free will, shall be subject to a mitigation of punishment, if the act performed itself constitutes another crime.''

As it can be seen, voluntary abandonment was not considered as a defence, but judges had to apply mitigation of punishment in this regard. The expression ''if the act performed itself constitutes another crime'' , had been provided due to a special model of criminal attempts; according to the former penal code an attempt was punishable only if it were stipulated in the special part of criminal code. In other words, no attempt was generally regarded as a criminal act, unless it was specified in the statute. It should be added that according to the current Iranian Penal Code (2003) all criminal attempts are punishable. In addition,

renunciation of a criminal attempt is considered as a defence; according to Article 123 ‘‘a person who voluntarily abandons the criminal attempt, shall not be punishable, but if the act performed itself constitutes another crime, the perpetrator shall be punishable for that crime.’’ Unlike the abolished Act, the present statute has not provided a mitigating factor for a renouncing perpetrator when the act performed itself constitutes a separate criminal act.

Swiss Criminal Code (2018) empowers courts to reduce the sentence or waive any penalty in respect of a person who does not complete the criminal act on his or her own free will as well as anyone who assists in preventing the completion of the criminal act. In this model, courts are granted unlimited discretion to decide whether to punish a perpetrator or not.[35] Any decision on this issue will be largely based on theoretical approaches to punishment. Thinking about the issue of punishment gives rise to a number of questions, the most fundamental of which is, why should offenders be punished? This question might produce the following responses:

• They deserve to be punished.

• Punishment will stop them from committing further crimes.

• Punishment tells the victim that society disapproves of the harm that he or she has suffered.

• Punishment discourages others from doing the same thing.

• Punishment protects society from dangerous or dishonest people.

• Punishment allows an offender to make amends for the harm he or she has caused.

• Punishment ensures that people understand that laws are there to be obeyed.

Over time there have been shifts in penal theory, and therefore in the purpose of punishment due to a complex set of reasons including politics, public policy, and social movements. Consequently, in a cyclical process, an early focus on deterrence as the rationale for punishment gave way to a focus on reform and rehabilitation. This, in turn, has led to a return to punishment based on the notion of retribution and just deserts.[36]

In Criminal Code of the People’s Republic of China (1997) an exemption or mitigation of punishment in the case of voluntary renunciation depends on the occurrence of the criminal result (damage). In other words, if no damage is caused, the perpetrator shall be exempted from punishment or, if any damage is caused, be given a mitigated punishment.[37]

Article 15 of the Penal Code of Poland (1997) reads as follows:'1. Whoever has voluntarily abandoned the prohibited act or prevented the consequence shall not be subject to penalty for the attempt.

2. The court may apply an extraordinary mitigation of punishment to a perpetrator who has voluntarily attempted to prevent the consequence which constituted a feature of the prohibited act.'

Unlike the Chinese and Swiss criminal statutes, mitigating factor in Polish criminal law is a judicial and not a legal factor. In other words, it is optional for judges to exercise a mitigation of punishment.

4. CONCLUSION:

Basically, criminal law seeks to penalize those who endanger public order by committing criminal offences. It seems to be a simple proposition, but at the same time a problematic one. It is because that irrespective of the complexity of the content and scope of public order, the danger element is almost a vague notion. Our attitudes towards the danger of criminal results largely depend on the nature of the effects and consequences that may be caused by criminal behaviours as well as the justification of criminal law. This is why the doctrines of criminal attempted liability and voluntary abandonment of those who freely desist from criminal attempts are so important.

Perhaps the most essential aspect of any discussion about renunciation from criminal attempts is that the rationales of criminal liability and punishment underpin criminal systems' approaches to the issue. As a generally accepted justification of modern criminal law, preventive view both at the individual and social levels can be considered as a logical ground for non-punishment of voluntary renunciation.

Voluntary renunciation from criminal attempts, as distinct from withdrawal from complicity, has also been discussed in terms of its characterization as an advantageous factor. The consequentialist and act-centred views offer different suggestions on this topic. According to proponents of the consequentialist view, the criminal result is a more important factor than the criminal action and/or intent in that it should be the main determinative factor of criminal reaction to voluntary abandonment. In contrast, *the act-centred approach gives priority to the perpetrator's behaviour and disregards the consequences resulted from his/her action. In fact, discontinuation of the criminal activity on his/her free will is a key factor in this regard.*

The abandonment of a criminal attempt has been recognized as a ground for exemption of criminal liability and/or impunity in many criminal justice systems and as an irrelevant factor in few countries. Some other criminal systems have included it as a mitigating factor in their statutes. It may be binding or

optional for courts to exercise mitigation of punishment in the case of voluntary renunciation.

Voluntary renunciation as a reason of exemption of criminal liability should be distinct from "justifications" and "excuses". In the case of justification, the defendant's conduct is not legally wrongful, even though it apparently violates a criminal law. A defendant is excused when he is not morally and legally blameworthy or responsible for his conduct, even though it apparently violates a criminal law. *However, voluntary renunciation as a ground for exemption from criminal liability does not relate to individual specialities of the offender. Additionally, the origin of irresponsibility in the context of excuses may be incapacity or the lack of mental element, but the reason of exemption of criminal liability is either the* uselessness of sentencing or the preventive policy of the criminal justice system.

Finally, although the result of the characterization of voluntary renunciation as a ground for exemption from criminal liability and/or impunity is the same, a distinction should be made in terms of legal basis as well as moral blameworthiness. In addition, the procedural technique of considering the two grounds is not identical. Anyway, characterization voluntary renunciation as a ground for exemption from criminal liability seems to be a more suitable means to achieve the goals of criminal justice policies and to realize the social and individual interests.

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[3] *- Yaffe, Gideon. Criminal Attempts, 124 (92) the Yale Law Journal, (2014).p.142*

[4] *- Fishman, Michael R. Defining Attempts: Mandujano's ERROR, 65 Duke Law Journal, (2015).p.378.*

[5] *- Ibid,379.*

[6] *- Elham, Gholamhosein & Mohsen Borhani, Introduction to General Part of Criminal Law, (Mizan Legal Foundation, Tehran, 2015) p. 227-228.*

[7] *- Doyle, Charles. Attempt: An Overview of Federal Criminal Law, R42001 Congressional Research Service. (2015), www.crs.gov.p.7-8.*

[8] *- Ibid, 227*

[9] *- For example, Section 50 of the Norwegian General Civil Penal Code provides that ''An Attempt shall cease to be punishable if the offender, before he knows that the felonious activity has been discovered, of his own free will either desists from the felonious activity before the attempt has been completed or prevents the result that would constitute the completed felony.'' Section 22 of*

Criminal Code of Denmark and Article 18 (3) of Criminal Code of Bulgaria contain a similar provision.

[10] - Mungan, Murat C. Abandoned Criminal Attempts: An Economic Analysis, 67 (1) Alabama Law Review, (2015)p.6-7.

[11] - Yaffe, Gideon. Criminal Attempts, 124 (92) the Yale Law Journal, (2014).p.143

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[14] - Baker, Dennis J. Reinterpreting Criminal Complicity and Inchoate Participation Offences, (Routledge, London & New York, 2016).p.308.

[15] - Cassidy, R. Michael & Gregory Massing, the Model Penal Code's Wrong Turn: Renunciation as a defence to Criminal Conspiracy, 64(2) Florida Law Review, (2012).p.357.

[16] - Ibid, 357

[17] - Morrison, Steven R. The System of Modern Criminal Conspiracy, 63 Catholic University Law Review, (2014).p.407.

[18] - Cassidy, R. Michael & Gregory Massing, the Model Penal Code's Wrong Turn: Renunciation as a defence to Criminal Conspiracy, 64(2) Florida Law Review, (2012).p.357.

[19] - According to current German criminal law doctrines, withdrawal does not negate an offence element, nor does it justify or excuse the criminal act because it occurs after it. Therefore, it should be considered as impunity.

[20] - It can be said that the term 'abandonment' is a broader word that encompasses both 'renunciation' and 'withdrawal'. As mentioned earlier, in some states of the USA 'abandonment' is generally used for both concepts, but at the same time it is used in the sense of 'renunciation' in other states.

[21] - Note that not all the mentioned requirements are necessary in every criminal justice system.

[22] - It should be noted that ''earnest effort'' must be interpreted in its ordinary meaning i.e. ''a very serious physical or mental energy'' that is used to prevent the commission of the crime. Additionally, the test is objective in that assessing the defendant' effort involves measuring his or her conduct against that of some hypothetical person, such as an 'ordinary' or 'reasonable' person, placed in a similar situation.

[23] - Irrespective of the extent of punishment, the criminal record of a person who may be convicted of assault is more lenient than that of the perpetrator of attempted murder. At a first glance, it may seem to give some offenders an implausible advantage. However, it should be noted that the inclusion of a favourable condition for offenders in criminal statutes is not necessarily to the detriment of the public; conversely, it will be in favour of the community by realizing the socially oriented goals of criminal justice policies.

[24] - Levy, Neil. The Good, the Bad and the Blameworthy, 1 (2) Journal of Ethics & Social Philosophy (2005).p.3.4

[25] - Husak, Douglas N. Justifications and the Criminal Liability of Accessories, 80 (2) Journal of Criminal law and Criminology 496 (1989)

[26] - Legitimate defence and state of extreme necessity are two significant justifications in criminal law. Accordingly, insanity is considered as an important excuse in criminal systems. However, Serbian Criminal Code (2005) contains a different and noteworthy provision in this regard;

according to Article 23(1): 'There is no criminal offence if it was committed in a state of mental incompetence'. In fact, insanity is considered as a justification, not an excuse.

[27] *- The other cases of exemption of punishment mentioned in Article 53 of the Moldovan Criminal Code include: juveniles, administrative liability, active repentance, situation change, probation and criminal liability limitation period.*

[28] *- Physical and mental characteristics may be interconnected and indivisible under certain circumstances; for instance, disease of the mind can be caused by arteriosclerosis, epilepsy, diabetes and somnambulism. Thus, it is a far broader notion than simply mental illness or disease of the brain. See Martin Hunt, A Level and AS Level Law 107 (London, Sweet & Maxwell, 2000).*

[29] *- Ginneken, Esther Van. The pain and purpose of Punishment: A Subjective Perspective 3, The Howard League for Penal Reform, Working Papers 22/2016.*

[30] *- Duff, R.A. Punishment, communication, and community, (Oxford: Oxford University Press, 2001).*

[31] *- Ginneken, Esther Van. The pain and purpose of Punishment: A Subjective Perspective 3, The Howard League for Penal Reform, Working Papers 22/2016.p.8*

[32] *- A provision like this has been provided in many other criminal justice systems; criminal statutes of Bulgaria, Peru, Finland, Germany and many other states contain a similar provision.*

[33] *- Although the Section specifically relates to joint commission, teleological interpretation permits the extension of the provision to the other category of voluntary abandonment, namely renunciation from criminal attempts. Accordingly, in the Chinese Criminal code an offender who discontinues a crime shall be exempted from punishment, provided that no damage is caused.*

[34] *- The distinction is even more vital where a juvenile offender has abandoned a criminal attempt in that labelling him/her in the case of ''exemption from punishment'' is more significant than that of ''exemption from criminal liability''.*

[35] *- Although it may be justified by the principle of the individualization of punishment as well as the purposes of punishment, undoubtedly weakens the solidarity of criminal policy in respect of penalization. Additionally, the purposes of punishment are too divergent and may conflict with each other. This is because some answers are based on reasons having to do with preventing crime whereas others are concerned with punishment being deserved by an offender. When a court imposes a punishment on an offender, it often tries to balance the sorts of reasons for punishment noted earlier, but sometimes certain purposes of punishment dominate other purposes. See B. Hudson, Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory, 3-4 (Buckingham, England: Open University Press 1996).*

[36] *- Cyndi Banks & Irene Pagliarella, Criminal Justice Ethics: Theory and Practice 104 (Thousand Oaks, California: Sage Publications, 2004).*

[37] *- As mentioned earlier, this provision is based on 'the consequentialist theory of criminal liability' which can be criticized on grounds that circumstances and events outside the agent's power are supposed to be main elements of sentencing and/or impunity.*